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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT E. TIGHE,

Defendant and Appellant.

D048037

(Super. Ct. No. MH98175)

APPEAL from a judgment of the Superior Court of San Diego County, Stephanie Sontag, Judge. Affirmed.

I.

INTRODUCTION

In May 1999, a trial court found Robert E. Tighe to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (SVPA) (Welf. & Inst.

Code, § 6600 et seq.).¹ The court committed Tighe to the Department of Mental Health for a two-year period of involuntary treatment. After two subsequent recommitments, in March 2005, the People filed a petition to continue Tighe's involuntary treatment. At a jury trial, the jury found Tighe to be an SVP. The trial court recommitted Tighe for an additional two-year term, until May 26, 2007.²

On appeal, Tighe claims that there is insufficient evidence to support the jury's findings that he suffers from a diagnosable mental disorder and that the disorder makes it likely that he will reoffend if released. Tighe also claims that the trial court erred in admitting evidence and argument pertaining to his prior SVPA commitments. Finally, Tighe contends that the SVPA violates the ex post facto and double jeopardy clauses of the state and federal Constitutions. We affirm the judgment.

II.

FACTUAL BACKGROUND

A. *The People's evidence*

At the outset of Tighe's trial, the parties stipulated that Tighe had previously been convicted of sexually violent offenses against two or more victims. On May 6, 1980, Tighe was convicted of forcible rape, forcible oral copulation, robbery, kidnapping, and attempted theft of victim Susan D., and forcible rape, forcible oral copulation, kidnapping, and attempted car theft of victim Barbara V.

¹ Unless otherwise specified, all subsequent statutory references are to the Welfare and Institutions Code.

Dr. Kathleen Longwell, a psychologist, testified that she was appointed by the California Department of Mental Health to perform an evaluation of Tighe under the SVPA. In performing her evaluation of Tighe, Dr. Longwell reviewed numerous documents including hospital records documenting Tighe's hospitalization at Atascadero State Hospital (Atascadero), prior probation reports, and prior evaluations of Tighe prepared by other mental health professionals. In addition, Dr. Longwell interviewed Tighe.

Dr. Longwell noted that Tighe stated that he was institutionalized at a young age and that he was sexually abused while institutionalized. Further, Dr. Longwell noted that Tighe was arrested as a juvenile on numerous occasions, and that he began abusing drugs at a young age. In describing the circumstances of the rapes that resulted in the May 8, 1980 convictions and brought him within the scope of the SVPA, Dr. Longwell noted that both rapes involved Tighe approaching females whom he did not know, armed with a weapon. He forced them to drive to a secluded place, and committed sexual assaults on them. Dr. Longwell also noted that Tighe committed a rape during a residential burglary in 1973, for which he was arrested and sentenced to prison. Tighe committed the qualifying rapes not long after he was released from prison for the 1973 rape. Dr. Longwell noted that Tighe's behavior had been "very poor in both the California Department of Corrections and at Atascadero"

² We have relied on the People's petition for recommitment in outlining the procedural background of this case, which appears to be undisputed.

Dr. Longwell diagnosed Tighe as suffering from "paraphilia not otherwise specified." Dr. Longwell explained that paraphilia refers to "recurrent, intense, sexually arousing fantasies, sexual urges or behaviors, involving [among other categories] [a] nonconsenting person . . . over a period of six months," causing either "clinical distress" or significant impairment of "life functioning." Dr. Longwell testified that Tighe also suffered from polysubstance dependency and an antisocial personality disorder. Dr. Longwell administered various psychological tests to Tighe for the purpose of assisting in determining whether Tighe would be likely to commit sexually violent and predatory behavior if he were released. Dr. Longwell testified that Tighe "falls into a high risk category for sexual reoffense," and that "based on his pattern of past sex offenses, which all have been clearly predatory, . . . his sex offenses will also be predatory."

Dr. Mark Scherrer, a psychologist, testified that the Department of Mental Health appointed him to evaluate Tighe for the purpose of determining whether Tighe met the criteria of an SVP. Dr. Scherrer noted that he had reviewed numerous records that detailed Tighe's criminal and mental health history, and interviewed Tighe in December 2004 and January 2005. Dr. Scherrer diagnosed Tighe as suffering from several mental disorders, including paraphilia not otherwise specified, multiple substance abuse problems, and an antisocial personality disorder. Dr. Scherrer testified that both Tighe's paraphilia and his personality disorder affected his emotional and volitional control. According to Dr. Scherrer, there was a serious and well-founded risk that Tighe would commit a sexually violent predatory offense if he were released.

Dr. Gabrielle Paladino, Tighe's treating psychiatrist at Atascadero, described Tighe's numerous behavioral problems while hospitalized. Among these problems were two incidents during which Tighe engaged in assaultive behavior with hospital staff. Paladino noted that in 1999, Tighe pulled a staff member's hair and had to be restrained. In November 2005, Tighe slapped a male staff member in the face. Dr. Paladino also noted that Tighe refused to participate in the sexual offender treatment program that Atascadero offered.

The People called Tighe as a witness. Tighe admitted that he committed the 1979 and 1980 qualifying rapes. Tighe also admitted that he committed a rape in 1973, during a residential burglary. Tighe denied having committed four other rapes, but remembered that he had previously admitted under oath that he had committed these rapes. Tighe denied that he suffered from a mental disorder. The prosecutor asked Tighe if he wanted the jury to "believe that there is no serious risk, that you will not reoffend if you are released?" Tighe responded, "I would like them to believe that, but I know it's hard for them to believe."

B. *Defense Evidence*

Dr. Shayna Gothard, a psychologist, testified as an expert on Tighe's behalf. Dr. Gothard testified that Tighe had an antisocial personality disorder, but that he did not have paraphilia. Dr. Gothard explained that she did not believe Tighe's commission of the 1973 rape was a paraphiliac rape because it did not appear to her to have been motivated by a desire to have nonconsensual sex. Dr. Gothard explained that the circumstances of the rape suggested that Tighe had been acting as an "opportunist" rather

than pursuant to a plan "for the purpose of gratifying sex with a nonconsensual witness [sic]." Dr. Gothard further explained that because the two qualifying rapes in 1979 and 1980 occurred less than six months apart, she did not believe that Tighe met the diagnostic criteria for paraphilia.

Tighe's sister and niece testified that they would be willing to assist him in various ways if he were released.

III.

DISCUSSION

A. *There is sufficient evidence to support the jury's findings that Tighe suffers from a diagnosable mental disorder and that the disorder makes it likely that he will engage in sexually violent conduct if released*

Tighe claims there is insufficient evidence to support the jury's findings that he suffers from a diagnosable mental disorder and that the disorder makes it likely that he will reoffend if released.

1. *Governing law*

"We review sufficiency of the evidence challenges under the [SVPA] according to the same standard pertinent to criminal convictions." (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52, citing *People v. Mercer* (1999) 70 Cal.App.4th 463, 466.) Accordingly, this court must review the entire record in the light most favorable to the judgment to determine whether there is substantial evidence to support the jury's finding that Tighe is an SVP. (See *People v. Johnson* (1980) 26 Cal.3d 557, 576-578.) To be substantial, the evidence must be "'of ponderable legal significance . . . reasonable in nature, credible and of solid value.' [Citation.]" (*Id.* at p. 576.)

Former section 6600, subdivision (a)(1) defines an SVP as "a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."³ Section 6600, subdivision (b) enumerates a list of qualifying sexually violent offenses. Section 6600, subdivision (c) defines a "diagnosed mental disorder" to include "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." Section 6600, subdivision (e) provides: "'Predatory' means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization."

In *Cooley v. Superior Court* (2002) 29 Cal.4th 228 (*Cooley*), the Supreme Court discussed these statutory provisions in outlining what a jury must find in order to determine that a person is an SVP:

"At the trial stage . . . a judge or jury must find, beyond a reasonable doubt, that (1) the offender has been convicted of qualifying sexually violent offenses against at least two victims as defined in [former] section 6600, subdivision (b); (2) the offender has a diagnosed

³ Section 6600, subdivision (a)(1) has been amended to reduce the number of victims necessary to qualify a person as an SVP. The statute currently reads: "'Sexually violent predator' means a person who has been convicted of a sexually violent offense against *one* or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1), *italics added*.) This amendment is not material to this appeal.

mental disorder as defined in section 6600, subdivision (c); (3) the disorder makes it likely the offender would engage in sexually violent conduct if released; and (4) that this sexually violent conduct will be predatory in nature as defined in section 6600, subdivision (e)." (*Id.* at p. 246, fn. 9.)

In order to prove that the offender is likely to engage in sexually violent conduct, the People must demonstrate that "the person is found to present a *substantial danger*, that is, a *serious and well-founded risk*, of committing such crimes if released from custody." (*People v. Roberge* (2003) 29 Cal.4th 979, 988.)

2. Application

Tighe claims there is not sufficient evidence in the record to establish that he currently suffers from a diagnosed mental disorder. We disagree.

Dr. Longwell, Dr. Paladino, and Dr. Scherrer each diagnosed Tighe as having paraphilia not otherwise specified, and an antisocial personality disorder. Dr. Longwell testified further that paraphilia is a "mental disorder" and that it tends to be "a life-long condition." Dr. Longwell described an antisocial personality disorder as a condition causing a person to "disregard . . . the rights of others" that "begin[s] sometime in early adolescence and it continues well into someone's adulthood."

Tighe does not dispute these diagnoses, other than to assert, "[I]t is impossible to determine how [he] currently can be diagnosed with a mental disorder absent the evaluator's reliance upon his prior offenses." We reject Tighe's suggestion that it was improper for the doctors to base their diagnoses on Tighe's past conduct. The SVPA recognizes that a conviction for an enumerated offense "shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator."

(§ 6600, subd. (a)(3).) While such a *conviction* "shall not be the sole basis for the determination" *that the person is an SVP* (§ 6600, subd. (a)(3)), there is no such restriction of the use of *prior conduct* in diagnosing a person with a *mental disorder*. It is inherent in the definition of "paraphilia" provided by Dr. Longwell that the diagnosis is premised on a person's past conduct. Further, Dr. Longwell testified that the condition "tends to be a life-long condition," and Dr. Gothard, who testified on behalf of Tighe, agreed. Accordingly, we reject Tighe's claim that there is not sufficient evidence that he currently suffers from a mental disorder .

Tighe also claims the record lacks sufficient evidence that he is likely to reoffend due to a lack of volitional control. Dr. Longwell testified that there is a serious and well-found risk danger that Tighe would engage in sexually violent conduct if released, due to his mental disorder. Similarly, Dr. Scherrer testified that Tighe "has a substantial risk to sexually reoffend if he was discharged to the community," and that he meets all of the criteria of an SVP. Among the considerable evidence supporting these opinions are the following: Tighe's persistent history of committing sexual acts against nonconsenting persons; various characteristics of Tighe's offense history, including its early onset; Tighe's failure to participate in the sexual offender treatment program offered at Atascadero; and Tighe's personality disorder. In addition, the jury could have been skeptical of the reasonableness of Tighe's relapse prevention plan, since Tighe failed to identify any sex offender outpatient treatment program in which he would participate.

We also reject Tighe's argument that "nothing has occurred since his convictions [in 1980] to add to the[] conclusions [of Drs. Longwell and Scherrer] that he is likely to

again commit sexually violent offenses." While it is true that Drs. Longwell and Scherrer based their opinions that Tighe currently poses a risk for reoffending, in part, on Tighe's prior conduct, it was entirely proper for them to do so. (See *People v. Poe* (1999) 74 Cal.App.4th 826, 830-832 [relying on appellant's offense history in rejecting claim that record lacked sufficient evidence to support the finding that appellant was likely to engage in sexually violent behavior].) In addition, the People did not rely solely on Tighe's past conduct to prove that he is likely to reoffend. Tighe's refusal to participate in the sexual offender treatment program at Atascadero, his combative behavior while at the hospital including the commission of an assault on a staff member approximately one month prior to the trial in this case, and his conduct in making derogatory comments with "sexual undertones" to females at the hospital, all support the jury's finding that Tighe is likely to commit a sexually violent offense if released.

We further reject Tighe's argument that there is not substantial evidence in the record to support the jury's finding that he is an SVP because there is no evidence that he acted in an inappropriate sexual manner at any time while institutionalized. In her testimony, Dr. Paladino explained that Tighe was housed in a "maximum secured forensic environment," and that because he was "being watched all of the time[,] it's not the same environment as in the community. . . ." The absence of evidence that Tighe has acted sexually inappropriately while at Atascadero does not preclude a finding that he is likely to act in such a fashion if he is released. (Accord, § 6600, subd. (d) ["'Danger to the health and safety of others' [in definition of SVP] does not require proof of a recent overt act while the offender is in custody"].)

B. *The trial court did not err in admitting evidence and allowing argument pertaining to Tighe's prior SVPA commitments*

Tighe claims that the trial court committed reversible error in allowing the People to present evidence and argument pertaining to his prior commitments as an SVP. Tighe claims the evidence was irrelevant and that it encouraged the jury to improperly rely on findings from prior proceedings in finding him to be an SVP in this proceeding. We review Tighe's claim under the abuse of discretion standard of review. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1113 [abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence and is particularly appropriate for questions regarding relevance and undue prejudice].)

1. *Factual background*

Tighe cites three examples of evidence and argument that were purportedly improper. First, Tighe notes that Dr. Scherrer testified that he evaluated Tighe in 2001 and 2003. When the prosecutor asked Dr. Scherrer whether he keeps an open mind when he reevaluates a patient, Dr. Scherrer responded: "Absolutely . . . I always try to go in with an open mind and I'm looking for new information, because basically what I'm doing in these evaluations is looking for evidence of a change in the person. That is the only way I can find it."

Second, Tighe notes that Dr. Scherrer also testified regarding a psychological evaluation that Dr. Di Francesca performed on Tighe after his arrest in 1980. The prosecutor asked Dr. Scherrer, "As early as 1980[,] in your review was it apparent that Mr. Tighe was diagnosed with a mental illness that predisposed him to commit acts of

sexual violence?" Dr. Scherrer responded in the affirmative. Tighe also cites the following testimony Dr. Scherrer offered regarding his use of the Di Francesca evaluation:

"[Prosecutor]: Would that previous psychiatric history give you a sense of whether or not a mental disorder was a relatively new phenomenon or one that had existed for a relatively long time in a person?

"[Dr. Scherrer]: Yes, specifically in this case the opinion by Dr. Di Francesca provided supporting evidence for what I was seeing which was an ongoing problem over a long period.

"[Prosecutor]: In fact, was her opinion that in 1980 that Mr. Tighe was a mentally disordered sexual offender?

"[Defense counsel]: Objection; this has nothing to do with this case.

"The Court: Overruled. I think the foundation has been laid as it is used in reaching the opinion.

"[Defense counsel]: It's a legal term that refers to the analysis. It's confusing to the jury to hear it.

"The Court: On [Evidence Code section] 352 I am going to allow the testimony. This is a different legal analysis and I will allow her to question him on that."⁴

Finally, Tighe notes that the prosecutor referred to Tighe's testimony from prior commitment trials, during the prosecutor's cross-examination of Dr. Gothard:

"[Prosecutor]: Are you aware, Doctor that Mr. Tighe testified under oath in trial in 2001 that he had committed seven rapes?

"[Dr. Gothard]: I am.

⁴ Notwithstanding the court's ruling, Dr. Scherrer did not respond to the question regarding Di Francesca's 1980 diagnosis because the prosecutor began to ask Dr. Scherrer questions regarding the basis for his conclusion that Tighe suffered from an antisocial personality disorder.

"[Prosecutor]: Are you aware that again in January 2004 Mr. Tighe testified under oath that he had committed seven rapes?

"[Dr. Gothard]: I am.

"[Prosecutor]: Does it concern you that he is giving you information in your interview that directly contradicts prior sworn testimony?

"[Dr. Gothard]: Yes it does."

2. *Governing law*

Evidence Code section 210 provides, "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Evidence Code section 721, subdivision (a) governs the scope of permissible cross-examination of an expert and provides in relevant part: "[A] witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion."

Evidence Code section 352 authorizes a trial court to exclude otherwise admissible evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Evidence Code section 353 requires a contemporaneous objection at trial to preserve an evidentiary objection on appeal. That statute provides:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

"(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

"(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

In *People v. Salomon Munoz* (2005) 129 Cal.App.4th 421 (*Munoz*), this court discussed the admissibility of evidence pertaining to a defendant's prior commitment as an SVP in an SVPA recommitment proceeding:

"The logical and constitutional necessity for an independent finding of a current mental disorder rendering the defendant dangerous arises not simply from the serious consequences that result from the finding but from the variability of such disorders and their effect on predictions of behavior. While it is certainly the case that the fact of a prior SVP commitment has some relevance in determining whether a defendant has a currently diagnosed mental disorder, that relevance is limited and great care must be taken in admitting evidence concerning the prior commitment." (*Munoz, supra*, 129 Cal.App.4th at p. 430.)

In *Munoz*, the prosecutor repeatedly asked the defendant why, if he had no predisposition to commit sexual offenses against children, he had failed to contest the issue in previous commitment proceedings. (*Munoz, supra*, 129 Cal.App.4th at p. 427.) The prosecutor also asked an expert if she had been asked to evaluate whether the defendant "continues to meet [the] criteria under the SVP law?" The expert responded in the affirmative. (*Ibid.*) In addition, during his opening and closing arguments, the prosecutor emphasized that there had been "no change" in the defendant since his prior

commitment as an SVP, and that the defendant had failed to contest his prior commitment. (*Id.* at p. 428.)

3. *Application*

We consider each of Tighe's evidentiary objections in order.⁵ First, Tighe failed to object at trial to Dr. Scherrer's statement that Scherrer looks "for evidence of change," when he reevaluates an SVP. If Tighe had objected at trial to this statement, the trial court could have admonished the jury that the People were required to prove that Tighe "is an SVP, not that he is *still* an SVP." (*Munoz, supra*, 129 Cal.App.4th at p. 430, italics added.) Accordingly, Tighe forfeited any claim on appeal pertaining to this statement. In any event, even assuming Tighe had properly preserved this objection for appeal, this isolated statement from Dr. Scherrer was different in kind and magnitude from those at issue in *Munoz*, and clearly does not amount to reversible error.

Second, Dr. Scherrer's testimony pertaining to Dr. Di Francesca's 1980 *evaluation* was relevant to establish that Tighe's mental illness was longstanding and related to his commission of prior rapes. The testimony did not relate to a prior *commitment* as did the testimony at issue in *Munoz*. (See *Munoz, supra*, 129 Cal.App.4th at p. 427.) We are aware of no authority that suggests that an expert in an SVP proceeding may not rely on a prior psychological evaluation in determining whether a defendant currently suffers from a mental disorder that makes it likely that the defendant would engage in sexually violent

⁵ Although it is not entirely clear from Tighe's brief whether he is claiming that each item of evidence was both irrelevant and inadmissible pursuant to Evidence Code section 352, we consider Tighe's claims as if he were raising both objections.

conduct if released. Even Tighe's expert, Dr. Gothard, testified that she had reviewed the Di Francesca evaluation. We conclude that the trial court did not abuse its discretion in admitting Dr. Scherrer's testimony regarding Di Francesca's prior psychological evaluation of Tighe.

Finally, Tighe failed to object at trial to that portion of the prosecutor's cross-examination of Dr. Gothard as to which he complains on appeal. Accordingly, Tighe forfeited any claim pertaining to this statement. (Evid. Code, § 353.) In any event, Tighe's prior testimony that he had committed seven rapes was plainly relevant and was a proper subject for cross-examination in view of Dr. Gothard's testimony that during her interview with Tighe, he had denied that he had committed some of these rapes. The jury could reasonably have inferred that Dr. Gothard relied on Tighe's denial in concluding that Tighe did not suffer from paraphilia. We conclude that the trial court did not abuse its discretion in allowing the cross-examination at issue.

Accordingly, we reject Tighe's argument that the trial court improperly admitted evidence and argument pertaining to his prior SVP commitments.

C. *The SVPA does not violate the ex post facto clause or the double jeopardy clause of the federal or state Constitutions*

Tighe claims that the SVPA violates the ex post facto and double jeopardy clauses of the federal and state Constitutions.

In *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1170-1179, the California Supreme Court concluded that the SVPA does not violate the ex post facto clauses of the federal and state Constitutions. We are bound by this decision. (*Auto Equity Sales, Inc.*

v. Superior Court of Santa Clara County (1962) 57 Cal.2d 450, 455.) Accordingly, we reject Tighe's claims that the SVPA violates the ex post facto clauses of the state or federal Constitutions.

Further, in *Hubbart v. Superior Court*, *supra*, 19 Cal.4th at pages 1178-1179, the court determined that the SVPA does not impose punishment for criminal conduct, but rather, that it constitutes a "civil commitment" proceeding. The double jeopardy provisions of the state and federal Constitutions do not apply to commitment proceedings that are civil in nature. (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1510; see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 369 [rejecting double jeopardy challenge to Kansas Sexually Violent Predator Act (Kansas Act) and noting, "Because we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution," and "[a] proceeding under the [Kansas] Act does not define an 'offense,' the elements of which can be compared to the elements of an offense for which the person may previously have been convicted"].) Accordingly, we reject Tighe's double jeopardy claims.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.